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The Doctrine of Legitimate Defense

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I. INTRODUCTION

Contemporary debates surrounding unilateral intervention have rightly centered on Article 51 of the UN Charter and its codification of the right of self-defense. In the absence of a Security Council authorization or a valid Article 51 argument, interventions are deemed illegal—an intolerable situation that has triggered several ad hoc attempts to explain or justify humanitarian intervention via new or invented *exceptions* to the Charter scheme, including the much-heralded responsibility to protect doctrine.¹

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1. For a good evaluation of these debates, see Saira Mohamed, *Taking Stock of the Responsibility to Protect*, 48 STANFORD JOURNAL OF INTERNATIONAL LAW 63 (2012).

This essay argues that a better solution resides within—not outside—Article 51 itself. The solution depends on recognizing the great complexity of Article 51, especially its explicit incorporation of natural law by reference to the *droit naturel to légitime défense*.² The effect of this incorporation was to preserve and protect, as a carve-out from the prohibition against force codified in Article 2 of the Charter, the rights of defensive force that applied in natural law (and so continue to be protected by Article 51). This is the doctrine of legitimate defense.

Part II explains in greater detail this dynamic incorporation of natural law in Article 51, and, in particular, defends the conclusion that it incorporates natural law into the Charter, thus making natural law absolutely central to any theory of self-defense that is faithful to the article's text. Part III.A examines the proper scope of defensive rights under natural law and concludes that defensive force included, in extreme situations, a right of intervention in rogue States that refused to comply with natural law in order to “perfect” the intervening State's right of preservation. Part III.B provides a normative foundation for the doctrine of legitimate defense by showing how the right of self-determination, the right to be free from genocide and the right to self-defense, all flow from a more primary right that one might call the right to exist—a right that attaches not just to formal States, but also to nations and peoples. Although public international lawyers are often uncomfortable discussing and relying upon the rights of nations, the universally recognized right of self-determination and the right to be free from genocide logically entail that non-State entities such as nations and peoples are legally protected by existing international law (*lex lata*). Finally, Part III.C, drawing on an earlier work published with George Fletcher, explains how a nation's right to self-defense can trigger a third party's right to intervene on its behalf. The textual basis for this claim is that self-defense and other-defense are structurally united in the phrase *droit naturel to légitime défense* for two reasons. First, natural law recognized a right of intervention against States that violate international law. Second, *légitime défense* is a criminal law concept that includes *both* self-defense *and* defense of others. Part IV explains the implications of this novel analysis. This reading of Article 51 shows how its explicit incorporation of natural law and its reference to legitimate defense provides the conceptual grounding for a modern doctrine of humanitarian intervention, especially once it is recognized that natural law protects

2. Charte des Nations Unis art. 51.

nations and peoples in addition to formal states. More importantly, this justification for humanitarian intervention is an *interpretation* of Article 51 and is therefore preferable to the responsibility to protect (RTP) or other legal doctrines that operate as purported *exceptions* to the UN Charter and thereby weaken its legitimacy. Finally, Part V applies the doctrine of legitimate defense to two recent examples to show that it licenses just enough force. It is submitted that the NATO intervention in Kosovo was a lawful exercise of legitimate defense, consistent with Article 51, to protect the ethnic Kosovars, but the Russian covert interventions in Crimea and eastern Ukraine do not meet the standards contained in the doctrine.

II. THE INCORPORATION OF NATURAL LAW IN ARTICLE 51

Public international lawyers are generally hostile to natural law. Even though natural law has a rich and distinguished history as the moral and legal foundation for natural *rights*, lawyers today get squeamish when the doctrinal conversation turns to natural law.³ Bentham famously referred to natural rights as “nonsense upon stilts”⁴ because he denied the existence of any natural law that could provide the foundation for these rights. For Bentham, the only rights that existed were the positive rights that governments enacted in their laws. Although there were prudential reasons for the government to make this determination, it could not be called a “right” until the government placed the coercive power of the State behind it and effectuated its promise. Of course, this positive conception of rights runs head first into the rhetoric that activists and litigants use when they talk of rights. In situations when governments deny the existence of the right in question, litigants do not simply request that the government *create* the right; they demand that the government *recognize* the right. Recognition logically entails that the right is pre-existing, as the phrase “inalienable right” in the American Declaration of Independence suggests. Even if the government purports to take away the right, the right still exists. This idea

3. Of course this is not universally true. See W. Michael Reisman, *The View from the New Haven School of International Law*, 86 AMERICAN SOCIETY OF INTERNATIONAL LAW PROCEEDINGS 118, 119 (1992) (“The New Haven School of jurisprudence is an entirely secular theory of law but it takes the perspective long associated with natural law, that of the decision maker.”).

4. Jeremy Bentham, *Anarchial Fallacies*, in NONSENSE UPON STILTS: BENTHAM, BURKE AND MARX ON THE RIGHTS OF MAN 46, 53 (Jeremy Waldron ed., 1987).

only makes sense if rights have some legitimacy and reality over and above their positive enactment by government sources.

So the key tension here is between natural law and positivism.⁵ Although legal positivism has many different flavors and aspects, at least one key element of the doctrine is that all law must be written and attributable to a specific governmental entity with the authority to issue such enactments.⁶ To find the law, in other words, one must examine a piece of written text and identify the *source* of the text and its specific authority to promulgate it.⁷ This is how one picks out pieces of law from non-law in the universe. Although there may be other sources of normative authority (e.g., moral or religious norms), the positivist decision-procedure allows one to pick out the distinctively *legal* sources of normativity.⁸

Positivism (or at least one strain of it) runs deep among public international lawyers, even though if looking from the outside one would not expect legal positivism to gain much traction in international law.⁹ Why is public international law a surprising fit for legal positivism?¹⁰ Because in addition to treaties and conventions as accepted sources of international law, mainstream public international law also includes customary law—a feature that is somewhat difficult to integrate into a standard definition of legal positivism because customary law is, by definition, unwritten in nature.¹¹ That being said, while conceding that customary international law is difficult (but not impossible) to integrate into a general framework of legal positivism, mainstream public

5. See ANTHONY J. SEBOK, *LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE* 228 (1998).

6. See ANTONY ANGHIE, *IMPERIALISM, SOVEREIGN AND THE MAKING OF INTERNATIONAL LAW* 44 (2007); GODEFRIDUS J.H. HOOF, *RETHINKING THE SOURCES OF INTERNATIONAL LAW* 36 (1983).

7. J.L. AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (1954).

8. For a more sophisticated version of positivism than Austin, see Joseph Raz, *Legal Positivism and the Sources of Law*, in *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 37 (Joseph Raz ed., 1983). See also MATTHEW H. KRAMER, *IN DEFENSE OF LEGAL POSITIVISM: LAW WITHOUT TRIMMINGS* (1999).

9. See JEAN D'ASPREMONT, *FORMALISM AND THE SOURCES OF INTERNATIONAL LAW: A THEORY OF ASCERTAINMENT OF LEGAL RULES* 25–27 (2011) (describing the confusing nature of contemporary debates on legal positivism in international law as “unfathomable and unintelligible”).

10. See Ingo Venzke, *Post-modern Perspectives on Orthodox Positivism*, in *INTERNATIONAL LEGAL POSITIVISM IN A POST-MODERN WORLD* 182, 185 (Jörg Kammerhofer & Jean d'Aspremont eds., 2014).

11. See DENNIS M. PATTERSON, *LAW AND TRUTH* 96 (1999).

international law is largely weighted towards positivistic frames of reference.¹² By that I mean that international lawyers have a rigid definition of what counts as international law, based on a theory of sources that is famously expressed in Article 38 of the International Court of Justice (ICJ) Statute.¹³ International law can be found in written treaties, decisions of international tribunals, general principles of law emanating from national legal systems (and therefore positive in nature) and customary international law with its relatively clear definition of what counts as custom: widespread, consistent, uniform and representative State practice, combined with *opinio juris*.¹⁴ Although customary international law is not written, it does emanate from a source—the world community of States—that has the authority under international law to promulgate binding rules of law through the process of establishing customary law.¹⁵ So it is theoretically possible for a legal positivist to accept the legitimacy of customary international law without abandoning legal positivism as a jurisprudential commitment. In contrast, though, natural law does not easily fit within that theory of sources and, consequently, international lawyers often denigrate it as “mere morality” or “mere philosophy,” but not something that should be dignified with the label “law.”¹⁶

Having explained the deep current of legal positivism that runs through public international law, I now wish to question whether international law (or any law) can be fully positivistic, by referring to the basic concept of self-defense in both its international (*jus ad bellum*) and domestic (criminal law) varieties.¹⁷ Self-defense is clearly codified in the domestic criminal law

12. For a discussion, see Jörg Kammerhofer, *Uncertainty in the Formal Sources of International Law: Customary International Law and Some of its Problems*, 15 EUROPEAN JOURNAL OF INTERNATIONAL LAW 523 (2004).

13. Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993.

14. See International Law Association, Final Report of the Committee on the Formation of Customary (General) International Law, *Statement of Principles Applicable to the Formation of General Customary International Law*, in REPORT OF THE SIXTY-NINTH CONFERENCE 712 (2000).

15. Indeed, it is interesting to note that Justice Holmes’ description of the positivist origins of the common law referred not just to sovereign sources but also *quasi-sovereign* sources. See *Southern Pacific Company v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

16. For a discussion, see GIDEON BOAS, PUBLIC INTERNATIONAL LAW: CONTEMPORARY PRINCIPLES AND PERSPECTIVES 13 (2012).

17. On the natural law origins of self-defense, see John J. Merriam, *Natural Law and Self-Defense*, 206 MILITARY LAW REVIEW 43 (2010).

of every jurisdiction. Similarly, self-defense has always been allowed in international law—and necessarily so.¹⁸ But imagine a State that decided to abolish the justification of self-defense in its criminal law, i.e., a State government that, on grounds of pure pacifism, declared that individuals *could not* fight back against illegal and unjustified attacks, even those that compromised the bodily integrity or life of the victim. I think it would be safe to say that even in that situation, the defender would *still* have the right to defend himself against the unlawful attack because that right cannot be taken away from him.¹⁹ The domestic legal system is capable of doing a lot of things, but taking away the fundamental right of self-defense is not one of them.²⁰ Similarly, if the domestic legal system were to codify brutality or genocidal treatment, that positive enactment would be overridden by natural law. But if that is the case, what is the *source* of that right?²¹ The source is clearly not the positive enactment of the domestic jurisdiction's penal statute, since the positive law contains no such justification. Indeed, the source of the right must pre-date the positive law; it must stand behind it. It is, in other words, a principle of natural law that endures even if positive law contradicts it.

Now, the legal positivist might object at this point that the pre-positive rights are *moral* in nature. In other words, the legal positivist might concede that it would be wrong for a domestic system to change its law in this manner, but the nature of this conclusion would be moral—not legal. The only thing that the positivist would deny would be the attachment of the word “legal” to the underlying right at issue here. The positivist would say that domestic legal systems that fail to recognize the right of self-defense are violating the moral rights of the defenders, but not their legal rights. The label “legal” is reserved for enactments from the duly authorized agents of the government. Of course, the hypothetical debate between the legal positivist and the natural lawyer depends in part on the resolution of

18. The natural law origins are discussed explicitly in DEREK W. BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW 4 (1958).

19. See Merriam, *supra* note 17, at 58 (“Self-defense under natural law is unrestrictive because, while it can be limited to some extent, it can never be taken away entirely; a law that purports to eliminate the right to self-defense would be unjust.”).

20. *Id.*

21. For theorists such as Hobbes, the natural right of self-defense provided the conceptual ground for many of the defensive rights that could be asserted in civil society. See Claire Finkelstein, *Hobbesian Reasoning and Wicked Laws*, in HOBBS TODAY: INSIGHTS FOR THE 21ST CENTURY 49, 58 (S.A. Lloyd ed., 2013).

the famous Hart-Fuller debate.²² Hart believed that a particular law was “law” as long as it was enacted according to a particular procedure (rule of recognition) and followed as law (social practice), regardless of whether the law was morally just.²³ In contrast, Fuller allowed for some considerations of moral justice to help determine whether a particular legal enactment constituted a law.²⁴ For example, Hart would have viewed Nazi laws as immoral but law nonetheless, while Fuller would denied these enactments the label “law” since they did not meet minimal standards of morality and justice.²⁵

While these are important jurisprudential debates, I want to argue in this essay that the law of self-defense under international law is entirely immune from the underlying impulse behind legal positivism. In other words, even if one accepts the entirety of Hart’s legal positivism, and rejects Fuller’s version of natural law, it would still be the case that the structure of the international law of self-defense requires reference to natural law. How can this be so?

The international law of self-defense is governed by Article 51, which states that “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.”²⁶ The key words here are “inherent right;” the idea is that the right of self-defense is inherent and pre-exists the positive law. Moreover, the equally authoritative French language version of the Charter makes the reference to natural law even more sharply: it refers to the “*droit naturel de légitime défense*.” Both “inherent right” and “*droit naturel*” suggest an explicit reference to natural law as defining the proper scope of self-defense.²⁷

22. See Karen Knop, *The Hart-Fuller Debate’s Silence on Human Rights*, in THE HART-FULLER DEBATE IN THE TWENTY-FIRST CENTURY 61 (Peter Cane ed., 2010).

23. See H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARVARD LAW REVIEW 593 (1958).

24. See Lon Fuller, *Positivism and Fidelity to Law: A Reply to Professor Hart*, 71 HARVARD LAW REVIEW 630 (1958).

25. *Id.* at 633 (“Without any inquiry into the actual workings of whatever remained of a legal system under the Nazis, Professor Hart assumes that something must have persisted that still deserved the name of law in a sense that would make meaningful the ideal of fidelity to law.”).

26. U.N. Charter art. 51.

27. For a full explanation of this argument, see GEORGE P. FLETCHER & JENS DAVID OHLIN, *DEFENDING HUMANITY: WHEN FORCE IS JUSTIFIED AND WHY* (2008).

How does this solve the problem of legal positivism? It solves it because Article 51 is an example of written authoritative law that satisfies whatever amount of legal positivism to which public international lawyers are committed. It is a written expression of the law-making authority of the States that negotiated, signed and ratified the UN Charter, consistent with their authority to make binding international law in the form of a treaty. Unless one is a legal positivist who denies the possibility of international law and treaties entirely, the Charter is a valid form of written international law. What is special about the Charter is that its Article 51 *incorporates by reference* natural law in order to fix the proper contours of self-defense.²⁸ It could have established the *content* of its provision on self-defense in any number of ways, but it did it by referring to natural law and incorporating its content into the written provision on self-defense. So while Article 51 articulates the form of self-defense, its content comes from natural law according to Article 51 itself. In a sense, natural law *becomes* positive law once it is incorporated into the written provisions of the treaty, although to fix the content of its exact source one needs to consult natural law as an interpretative guide to what the provision means.

We can now turn directly to the question of the scope of self-defense as defined by the Charter's positive incorporation of natural law through its reference in Article 51. State members of the United Nations are prohibited from using force or the threat of force to solve international disputes—a prohibition that is codified in Article 2(4).²⁹ This prohibition is generally assumed to now transcend its codification in the Charter; it is both customary and *jus cogens*, and applies to non-member States as well.³⁰ However, the prohibition against force is not universal, because Article 51 carves out cases of legitimate defense (*légitime défense*) from the scope of the Article 2 prohibition.³¹ The point of the carve-out is to preserve and exempt the natural law of legitimate defense from the general prohibition

28. The use of natural law to understand Article 51 is rare but not unprecedented in contemporary scholarship. See, e.g., William Bradford, "The Duty to Defend Them": A Natural Law Justification for the Bush Doctrine of Preventive War, 79 NOTRE DAME LAW REVIEW 1365, 1430 (2004); Sean D. Magenis, *Natural Law as the Customary International Law of Self-Defense*, 20 BOSTON UNIVERSITY INTERNATIONAL LAW JOURNAL 413, 414 (2002).

29. See IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 4 (1963).

30. See YORAM DINSTEIN, WAR, AGGRESSION, AND SELF-DEFENSE 105 (2011).

31. FLETCHER & OHLIN, *supra* note 27, at 65–72.

on the use of force codified in Article 2.³² Indeed, Article 2 gestures towards the Article 51 carve-out when it states that “[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” The operative phrase here is “inconsistent with the purposes of the United Nations.” Presumably, one purpose of the United Nations is to protect the rights identified in the Charter, including the natural right of legitimate defense. Article 51 then explicitly carves out the natural right of legitimate defense in a way that is entirely consistent with the animating impulse behind Article 2(4). More specifically, the United Nations is, among other things, an organization dedicated both to international peace and collective security, and the right of all member States to engage in legitimate defense—unilaterally if necessary—is an essential element of the UN Charter’s security regime. Indeed, had the Charter *not* carved out the natural law of self-defense from the Article 2(4) prohibition on the use of force, the result would have been a near-fatal defect in the burgeoning relevance of this fragile international organization. Had the drafters required that the Security Council be the *exclusive* authorization for the use of force *in all situations*, the result would have been that States would have exercised their natural right to legitimate defense anyway (rather than face destruction), with the consequence that this hypothetical international regime would have quickly collapsed as irrelevant and impotent.³³

This analysis suggests two important facts that are sometimes overlooked in more conventional analyses of the right to self-defense. First, natural law is an essential component in any discussion of the right of self-defense, because the Charter’s framers decided to anchor their definition of self-defense using and incorporating the basic principles of natural law. Nor was this a flight of fancy or an odd turn of phrase. It was, instead, a perfectly sensible and indeed indispensable policy choice: it was a decision to constrain the power of the Charter’s centralized force regime in such a

32. Other scholars have used the term “carve out” to understand Article 51; the idea is not controversial. See, e.g., Matthew C. Waxman, *Cyber-Attacks and the Use of Force: Back to the Future of Article 2(4)*, 36 YALE JOURNAL OF INTERNATIONAL LAW 421, 427 (2011). See also Albrecht Randelzhofer, *Article 51*, in 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 788, 796 (Bruno Simma ed., 2d ed. 2002).

33. Cf. CHRISTINE D. GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 16 (3d ed. 2008) (discussing primary but not exclusive authority of the Security Council on use of force questions, according to the International Court of Justice).

way as to preserve the discretion that natural law conveys upon all victims of international aggression to resist their attackers. Had the drafters overstepped and negated this natural right, the Charter might have been ignored. Instead of negating this natural right, the framers *preserved* it.³⁴

Second, none of this runs afoul of modern notions of legal positivism, because natural law is not directly part of the law of self-defense; it is *indirectly* part of self-defense through its textual incorporation in the language of Article 51. By incorporating and preserving pre-Charter natural law, the natural right of self-defense became quasi-textual. However, in order to interpret the scope of the textual right, one needs to understand natural law. Although this conclusion might be uncomfortable for modern positivist international lawyers who dislike natural law, a careful attention and fidelity to the treaty's text requires it.

III. THE PROPER SCOPE OF LEGITIMATE DEFENSE UNDER NATURAL LAW

The next task is to excavate the appropriate scope of legitimate defense under natural law—and by extension Article 51. In the following section, I argue that the natural law concept of legitimate defense is much broader than conventional notions of self-defense. Consequently, this section outlines a normative conception of legitimate defense based on the notion of self-preservation (including the right of existence) and shows how this natural law right is holistically linked to present-day doctrines of self-defense, the prevention of genocide and self-determination.

A. *Natural Law and Self-Preservation*

Natural law theorists writing in the nineteenth century often discussed self-defense under the rubric of “self-preservation” and the “necessity of self-

34. KINGA TIBORI SZABO, ANTICIPATORY ACTION IN SELF-DEFENCE: ESSENCE AND LIMITS UNDER INTERNATIONAL LAW 30 (2011) (“the natural law concept of self-defense was enshrined in the United Nations Charter”). *But see* David Kretzmer, *The Inherent Right to Self-Defence and Proportionality in Jus Ad Bellum*, 24 EUROPEAN JOURNAL OF INTERNATIONAL LAW 235 (2013); Sean Murphy, *The Doctrine of Preemptive Self-Defense*, 50 VILLANOVA LAW REVIEW 699, 713–14 (2005); William K. Lietzau, *Old Laws, New Wars: Jus ad Bellum in an Age of Terrorism*, 8 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 383, 388 (2004).

preservation.”³⁵ This provided the normative ground for the use of military force to repel an unjust attack. The basic idea was that countries have a right to self-preservation and an outside attack that threatens their existence will require them—out of necessity—to use military force to preserve their existence.³⁶ For ease of locution I refer to this as the “right to exist,” which although not described in this language by natural law theorists of the eighteenth and nineteenth centuries, does nonetheless capture the essence of self-preservation that grounded their conception of self-defense. Given the fundamental nature of the right to self-preservation, the right was not subject to rescission by positive law. It is indelible and inalienable. Its source was—and remains—natural law.

For example, Christian Wolff characteristically argued that “man is bound to preserve himself by nature” and that “likewise the right of defending one’s self against the injuries of others belongs to man by nature, and the law of nature itself assigns it to a nation.”³⁷ Similarly, Vattel argued that all States, just like all individuals, have the right to preserve themselves under natural law:

The right of employing force, or making war, belongs to nations no farther than is necessary for their own defence, and for the maintenance of their rights. Now, if any one attacks a nation, or violates her perfect rights, he does her an injury. Then, and not till then, that nation has a right to repel the aggressor, and reduce him to reason. Further, she has a right to prevent the intended injury, when she sees herself threatened with it.³⁸

35. Fenwick concludes that the term “self-preservation” fell out of favor around 1920. See C.G. Fenwick, *Book Review*, 41 HARVARD LAW REVIEW 936 (1928) (reviewing BRUCE WILLIAMS, *STATE SECURITY AND THE LEAGUE OF NATIONS* (1927)).

36. See Roman Boed, *State of Necessity as a Justification for Internationally Wrongful Conduct*, 3 YALE HUMAN RIGHTS AND DEVELOPMENT LAW JOURNAL 1, 4 (2000) (“Necessity, it seems, was from long ago coupled with the notion of self-preservation. That is to say, when a threat to self-preservation arose, it was considered justified to take any steps necessary to preserve one’s existence, even if such steps would have been unlawful had they been taken in the absence of a threat to self-preservation.”).

37. See CHRISTIAN WOLFF, *JUS GENTIUM METHODO SCIENTIFICA PERTRACTATUM* § 3, at 9–10 (Joseph H. Drake trans., Oxford University Press 1934) (1764).

38. See EMMERICH DE VATTTEL, *THE LAW OF NATIONS; OR PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS* ch. III § 26, at 301 (Joseph Chitty ed., T. & J. W. Johnson, Law Booksellers 1844) (1758).

Wheaton held a similar view and explicitly referred to the right of self-defense as the right of self-preservation: “Of the absolute international rights of States, one of the most essential and important, and that which lies at the foundation of all the rest, is the right of self preservation.”³⁹ This includes subsidiary rights of which the most important is the notion of self-defense. As Wheaton explained,

“[i]n the exercise of these means of defence, no independent State can be restricted by any foreign power. But another nation may, by virtue of its won right of self-preservation, if it sees in these preparations an occasion for alarm, or if it anticipates any possible danger of aggression, demand explanations”⁴⁰

Indeed, the right of self-preservation was so central to the natural law conception of self-defense that natural law theorists regarded it not simply as a right but also a *duty*. Wheaton recognized this when he wrote that self-preservation “is not only a right with respect to other States, but a duty with respect to its own members, and the most solemn and important which the State owes to them.”⁴¹ It might sound odd to think of self-preservation as not only a right but also a duty, but, in fact, this conceptualization was common under natural law and essential to understanding its broader impact with regard to the doctrine of military intervention. Nor was Wheaton alone in using the language of duty to refer to self-preservation. For example, Wolff referred to self-preservation not only as a right but also a duty because “every nation is bound to preserve itself.”⁴² This includes “averting the danger of destruction.”⁴³ Specifically, Wolff concluded that “[t]he right belongs to every nation to defend itself and its right against another nation. For the right belongs to everybody. Therefore, since the same right is to be applied to nations also, the right belongs to every nation also to defend itself against another nation.”⁴⁴

In these comments one can see how the duty to preserve oneself is intimately linked to the duty to ensure the *perfection* of other States as well. This notion goes back at least as far back as Vattel, who concluded that “a

39. See HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW pt. II, ch. I, at 86 (6th ed. 1855).

40. *Id.*

41. *Id.*

42. WOLFF, *supra* note 37, § 273, at 139.

43. *Id.*

44. *Id.*

nation must not simply confine itself to preserving itself but must also pledge itself to the preservation (and perfection) of other nations as well.”⁴⁵ This suggests that the silo of sovereignty, which so often animates current international law thinking, was weaker under the natural law theorists. As a result, self-preservation in its broadest sense included not just repelling an outside attack, but also pro-actively intervening externally in foreign States whose behavior was inconsistent with basic principles of natural law. For example, Hall argued that “intervention” in foreign States was justified on grounds of “self-preservation.”⁴⁶ This shows that the current dichotomy between self-defense and foreign intervention was not present, at least not in its current starkness, in the natural law realm. Indeed, Hall wrote specifically that “interventions for the purpose of self-preservation naturally include all those which are grounded upon danger to the institutions, to the good order, or to the external safety of the intervening state.”⁴⁷ Intervention was consistently defended by natural lawyers.⁴⁸

45. Vattel, *supra* note 38, at 136.

46. See WILLIAM E. HALL, A TREATISE ON INTERNATIONAL LAW ch. VII (1880).

47. *Id.*, § 91, at 242. Also, Hall includes a lengthy discussion of intervention during a civil war at the behest of one party to the conflict: “It is generally said, and the statement is of course open to no question, that intervention may take place at the invitation of both parties to a civil war.” See *id.*, pt. II, ch. VIII, § 94, at 249.

48. See, e.g., 2 HUGO GROTIUS, ON THE LAW OF WAR AND PEACE ch. CCV, pt. VIII(1) (A.C. Campbell trans., 1901) (1625) (concluding that governments lose “the rights of independent sovereigns,” their right to be free from outside interference, and the “privilege of the law of nations” when they “provoke their people to despair and resistance by unheard of cruelties”); Vattel, *supra* note 38, ch. IV, § 54 (permitting intervention in support of oppressed populations); SAMUEL PUFFENDORF, DE JURE NATURAE ET GENTIUM LIBRI OCTO bk. VIII, ch. 6, § 14 (C.H. Oldfather & W.A. Oldfather trans., 1934) (1688). In a series of important articles, Evan Criddle (alone and collaborating with Evan Fox-Decent) has shown that this fiduciary relationship is not just a relic of the natural law past but is, rather, a foundational concept for today’s international legal order. See especially Evan J. Criddle & Evan Fox-Decent, *A Fiduciary Theory of Jus Cogens*, 34 YALE JOURNAL OF INTERNATIONAL LAW 331, 334 (2009) (discussing the fiduciary model of State sovereignty and concluding that “[e]ven after natural law theory fell into disrepute in the nineteenth century with the rise of legal positivism, the classical notion of peremptory law continued to influence international legal theory well into the modern era”); Evan J. Criddle, *Standing for Human Rights Abroad*, 100 CORNELL LAW REVIEW 269, 302 (2015) (discussing the “parent-child” analogy in Grotius to ground a general theory of countermeasures in contemporary international law); Evan Fox-Decent & Evan J. Criddle, *The Fiduciary Constitution of Human Rights*, 15 LEGAL THEORY 301 (2009) (describing the State-subject relationship regulated by human rights law as a “fiduciary relationship”).

One might argue that although natural law recognized a broad right of external intervention under the rubric of self-preservation and the duty to perfect that right in other States, this basic scheme was upended by the adoption of the UN Charter with its duty to refrain from using force under Article 2 and its very limited right of self-defense codified in Article 51. Some scholars act as if this transformation occurred almost instantaneously, a veritable “Grotian moment” where the legal norms quickly solidified.⁴⁹ If this transformation happened rapidly, one could point as its inspiration to the horrors of World War II, the dangers of aggressive war (by Germany and Japan) and the need to avoid a repeat of this scarring international experience.

But there is little evidence of such a Grotian moment. Indeed, the broader natural law right of intervention was still very much in evidence in the early days after the adoption of the UN Charter when the horrors of World War II were still fresh in memory. For example, Hersch Lauterpacht’s seventh edition of *Oppenheim’s International Law*, published in 1948, still couches the right of intervention in the form of self-preservation: “From the earliest time of the existence of the Law of Nations self-preservation was considered sufficient justification for many acts of a State which violate other States.”⁵⁰ Lauterpacht also argued that “[o]nly such acts of violence in the interest of self-preservation are excused as are necessary in self-defence, because otherwise the acting State would have to suffer, or have to continue to suffer, a violation against itself.”⁵¹

The discussion of “self-preservation” is not simply a holdover from Oppenheim’s earlier editions that Lauterpacht did not revisit. In fact, Lauterpacht specifically announced in the preface to the seventh edition that the treatise was revised *after* the adoption of the UN Charter and that its content takes into account these developments since “[t]here would be no justification for neglecting, in a treatise of this kind, an account of these

49. Cf. DAN KUWALI, THE RESPONSIBILITY TO PROTECT: IMPLEMENTATION OF ARTICLE 4(H) INTERVENTION 58 (2010) (referring without necessarily endorsing the view that “[w]ith this proscription in the UN Charter under Article 2(4), the custom of ‘humanitarian intervention,’ if it could still be considered a valid practice, was now abrogated”). The term “Grotian moment” comes from Falk. See Richard A. Falk, *The Grotian Moment: Unfulfilled Promise, Harmless Fantasy, Missed Opportunity?* 13 INTERNATIONAL INSIGHTS 3 (1997).

50. See 1 LASSA OPPENHEIM, INTERNATIONAL LAW: A TREATISE ch. V, § 129 (Hersch Lauterpacht, 7th ed. 1948).

51. *Id.*, § 130, at 266.

developments.”⁵² In the text of the treatise, Lauterpacht explains how the right of self-preservation is connected with the carve-out of in Article 51: “Thus the Charter of the United Nations leaves intact the inherent right of individual or collective self-defence in case of armed attack against a member of the United Nations until the Security Council takes action.”⁵³

Is this notion consistent with military intervention? Yes, Lauterpacht recognized that it could be consistent with the right of self-preservation. The treatise notes *seven* reasons for intervention, including: “If a State in time of peace or war violate such rules of the Law of Nations as are universally recognized by custom or are laid down in law-making treaties, other States have a right to intervene and to make the delinquent submit to the rules concerned.”⁵⁴ His views in this regard are evidence that the natural law origins of self-defense, under the broader notion of self-preservation, endured well into the era of the UN Charter.

This broader notion of self-preservation, which Lauterpacht argued was consistent with Article 51, connects the natural law notion of self-preservation with modern doctrines of intervention. To summarize the argument, the Charter by its explicit terms preserves the natural law right of self-defense. Under natural law, self-defense was conceptualized in terms of self-preservation, not only as a right but also as a duty. The duty extended not just to preserving one’s own existence, but also *perfecting* that right both for oneself and others. This provided for the right of intervention against States acting contrary to international legal norms. In short, natural law included an implicit doctrine of intervention for the benefit of third parties that was subsumed under the doctrine of self-preservation. This fact was not lost on Lauterpacht who also argued that intervention “is generally directed only against a party within the state, or against a particular form of state life, and it is frequently carried out in the interest of the government or of persons belonging to the invaded state.”⁵⁵ In other words, it was understood even in the emerging United Nations era that intervention on behalf of a foreign party was part of the doctrine of self-preservation. And it is that right which was preserved by Article 51 and its carve-out from the Article 2 prohibition on the use of force. Impoverished interpretations of Article 51 that ignore its natural law origins produce an erroneously narrow view of defensive force. Moreover,

52. *Id.* at v (preface to the seventh edition).

53. *Id.*, § 130, at 267.

54. *Id.*, § 135, at 276.

55. *Id.*, ch. VIII, § 88, at 240.

this ignorance of natural law is unjustified even on textualist and positivist grounds, since Article 51 by its bare terms incorporates by reference the right as it existed under natural law.

As a conceptual matter, one might argue that the right of legitimate defense belongs to nations instead of States. Since the right of legitimate defense emanates from natural law, and States *qua* States are creatures of positive law, then there must be some notion of legitimate defense that existed even if there was no international system to confer recognition on States. Think of the point this way: even if the world collapsed into pure anarchy, the right of self-defense would still exist since it is a creature of natural law. Even in the absence of formal State recognition, the right would attach to some other more primary unit of analysis, such as nations and peoples. This would entail a right of intervention on behalf of nations and peoples (including oppressed minorities) seeking to exercise their rights of self-preservation.

However, the natural law theorists would not have expressed the right of intervention using the language of nations and peoples. Although they recognized the distinction between nations and States,⁵⁶ their doctrine of intervention was based on a broad reading of self-preservation and the duty to *perfect* that right as it attached to other States. They were not likely to use the language of “nation” and “people” to describe the entities on whose behalf intervention was permitted. They were more likely to simply assert that the intervening State was perfecting the right of the target State (even if that intervention was contrary to the wishes of the established government of the target State). With that being said, as a normative matter the concept of nations and peoples offers a more conceptually satisfying rubric with which to express the natural law right of intervention. In the following section, I explain how contemporary international law already implicitly recognizes the right of nations and peoples to exist, and, therefore, the broad reading of the natural law of self-preservation is entirely consistent with the current trajectory of positive international law—which offers substantial protection to these entities.

56. Wheaton understood that States and nations were separate. See WHEATON, *supra* note 39, at 27 (“A State is also distinguishable from a Nation, since the former may be composed of different races of men, all subject to the same supreme authority. Thus the Austrian, Prussian and Ottoman empires, are each composed of a variety of nations and people.”).

B. Conceptual Foundations of Legitimate Defense

The right to exist provides the normative foundation for other rights in international law that are often thought of as separate and conceptually distinct from self-defense, such as protection from genocide and self-determination. But if one scrutinizes these concepts, it becomes clear that the latter two are both positive expressions of—and vindications of—the natural law concept of self-preservation and the right to exist.

The most obvious example here is genocide, which involves the right of protected groups to be free from existential threat. The underlying impulse of the law of genocide is that the group itself is deserving of protection, not just the underlying individuals who make up the group. Although this point is often confused, the underlying predicate offenses in the Genocide Convention (as well as the relevant statutes of the ad hoc tribunals) include predicate offenses that do not involve the killing of the group members.⁵⁷ These predicate offenses include forcibly transferring children from one group to another, imposing measures intended to prevent births and deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part. These elements target the destruction of the group itself—as opposed to the human beings who make up the group—and declare them illegal.⁵⁸ The law of genocide is based on the idea that some groups are deserving of protection and that an attack against their existence is a fundamental breach of international law.

As for which groups are protected by the law of genocide, the Convention protects national, ethnical, racial and religious groups. There has been some discussion of whether the list is under-inclusive and whether political groups should be included.⁵⁹ That discussion is important, but not one that needs to be resolved here. The important point is that national groups—not just States—are protected by the law of genocide. Even if a group does not constitute a formal State, its right to exist is preserved by the law of genocide and an existential attack against it

57. Convention on the Prevention and Punishment of the Crime of Genocide art. 2, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277.

58. See WILLIAM SCHABAS, GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES 236 (2000). See also LARRY MAY, GENOCIDE: A NORMATIVE ACCOUNT 65 (2010).

59. See DAVID L. NERSESSIAN, GENOCIDE AND POLITICAL GROUPS 177 (2010).

constitutes a *jus cogens* violation.⁶⁰ The lesson to be drawn from this fact is that the right to exist under natural law is not limited to formal States, it also includes—at the very least—State-like entities such as nations that do not have formal recognition under positive international law. Their inability to be recognized under international law does not prevent them from being protected by the law of genocide—a positive law outgrowth of the underlying natural right to self-preservation.

It should be obvious by now why the law of genocide is linked to the natural law right to exist. Although the Genocide Convention was not drafted until 1948, and the term genocide did not exist until Raphael Lemkin coined the term in 1944,⁶¹ the idea that a national group is free from existential attack is now hardwired into our thinking. Indeed, consider what the state of the law would be if the Genocide Convention was repealed and enough State parties signed a treaty declaring that genocide was permissible. The result of such a declaration would be nugatory. One way of expressing the point is that the prohibition against genocide is *jus cogens* and non-derogable, regardless of what the Genocide Convention says.⁶² But the question is *why* it is *jus cogens* and why the international community is not in a position to permit existential attacks against national groups. The only coherent answer is that the prohibition against genocide is linked to a more fundamental right—the right to exist—that supervenes over treaty-based law. It comes from natural law.

Under natural law, the right to exist should be attributed to nations and peoples—not to States. There are two major pieces of evidence for this proposition. The first is that the right to be free from genocidal attack is not attributed to States, but rather to national and ethnic groups regardless of whether they form a State or not. Indeed, most of the urgent cases of genocide in the past century have involved cultural or national groups that did not have their own State (e.g., Tutsis who shared a State with Hutus, and Jews who lived in Germany and the rest of Europe prior to the creation of Israel). Indeed, the ethnic violence in the Balkans involved national groups *inside* Bosnia and Kosovo; the groups that are protected by

60. See CAROLINE FOURNET, *THE CRIME OF DESTRUCTION AND THE LAW OF GENOCIDE* 99 (2013).

61. RAPHAEL LEMKIN, *AXIS RULE IN OCCUPIED EUROPE* (1944).

62. For a discussion of the *jus cogens* nature of genocide, see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosn. & Herz. v. Yugo. (Serbia & Montenegro), 1993 I.C.J. 325, 441 (Sept. 13) (separate opinion of Lauterpacht, J. ad hoc).

the law of genocide are untethered from a formalistic conception of States as the exclusive units of international law.

The second piece of evidence is the right of self-determination. This right, even under positive international law, is attributed to nations and peoples.⁶³ It cannot be attributed simply to States otherwise it would be utterly vacuous. The concept of self-determination does not simply preserve the right of States to exist as States, which would only preserve the status quo and nothing else. Rather, the right of self-determination is the right of a nation or a people to exercise meaningful self-determination in the form of self-government.⁶⁴ In some cases that right takes the form of internal self-determination (through meaningful participation in a larger political unit) or external self-determination (through the creation of a separate and new State specifically designed to vindicate the right of self-determination). There are important debates in the literature over when negative conditions trigger external self-determination and a right to remedial secession; for the moment those debates can be set aside. The important point is that the right of self-determination is not a right that belongs to States exclusively—it belongs to nations and peoples.

We now have explored two rights under international law that are afforded to national groups: the right to be free from genocide and the right to self-determination. In a sense, this should not be surprising, because the underlying natural law right, the right to exist, belongs to national groups regardless of whether or not they are recognized as formal States under our system of international law. I now want to extend the analysis one step further and suggest that the right of legitimate defense, since it is an expression of this deeper right to self-preservation under natural law, also belongs to national groups that do not constitute a State.

For some positivist international lawyers, this step in the argument might go one step too far; but the argument is sound. Remember, the structure of the UN Charter provides for a prohibition against the use of force against member States, which is extended by custom and *jus cogens* to all States. Article 51 then carves out from that prohibition the natural law right of legitimate defense, which is preserved in spite of the Article 2 prohibition on the use of force. Since the content of that right is provided

63. See ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL APPRAISAL (1998).

64. Cf. Per Sevastik, *Secession, Self-determination of "Peoples" and Recognition—The Case of Kosovo's Declaration of Independence and International Law*, in LAW AT WAR: THE LAW AS IT WAS AND THE LAW AS IT SHOULD BE 231, 235 (Ola Engdahl & Pal Wrange eds., 2008).

by natural law, if natural law preserves the right of national groups to protect themselves, then this right is preserved by Article 51. Furthermore, there is nothing in Article 2 that—by its terms—applies the prohibition against the use of force to national groups anyway. It is States that are prohibited from using force. But even if the Article 2 prohibition applies to national groups that remain stateless, the Article 51 carve-out preserves those rights that they have under natural law.

C. *Legitimate Defense and Article 51*

Now comes time to outline the exact contours of the right of legitimate defense under Article 51. This requires careful attention not just to natural law, but also to the bare *text* of Article 51, which is often overlooked. The English language version of the Charter refers to the inherent right of self-defense, individual or collective. In addition, the French language version of the Charter refers to the “*droit naturel de légitime défense*.”⁶⁵ The phrase *légitime défense* refers to the continental notion of legitimate defense that one finds in the criminal law of jurisdictions such as France,⁶⁶ Germany or Spain, as well as the legal systems that draw their inspiration from them.⁶⁷ American and British common law jurisdictions often have one penal law provision for self-defense, one for defense of others and possibly a third

65. The phrase legitimate defense also appears in the Spanish language version of the UN Charter. See Carta de las Naciones Unidas art. 51 (“*legítima defensa, individual o colectiva*”).

66. French criminal law provides that “[n]’est pas pénalement responsable la personne qui, devant une atteinte injustifiée envers elle-même ou autrui, accomplit, dans le même temps, un acte commandé par la nécessité de la légitime défense d’elle-même ou d’autrui, sauf s’il y a disproportion entre les moyens de défense employés et la gravité de l’atteinte.” See CODE PÉNAL [C. PÉN.] art. 122-5.

67. For example, Swiss criminal law is influenced by German criminal law. Section 15 of the Swiss criminal code is titled “legitimate defense” and states that “[i]f any person is unlawfully attacked or threatened with imminent attack, the person attacked and any other person are entitled to ward off the attack by means that are reasonable in the circumstances.” See SCHWEIZERISCHES STRAFGESETZBUCH [STGB], CODE PÉNAL SUISSE [CP], CODICE PENALE SVIZZERO [CP] [CRIMINAL CODE] Dec. 21, 1937, SR 311.0, art. 15 (unofficial English government translation available at <http://www.admin.ch/ch/e/rs/3/311.0.en.pdf>). In German, the provision is titled “Rechtfertigende Notwehr” and states that “[w]ird jemand ohne Recht angegriffen oder unmittelbar mit einem Angriff bedroht, so ist der Angegriffene und jeder andere berechtigt, den Angriff in einer den Umständen angemessenen Weise abzuwehren.”

for defense of property.⁶⁸ In contrast, civil law jurisdictions, using an economy of words, simply roll up everything into one notion of legitimate defense which allows any individual to use appropriate and necessary force to repel an unlawful attack against himself or a third party (what a common law lawyer would refer to as defense of others). Of course, the defensive force must be necessary in order to repel the attack and it must not be disproportionate. For this reason, the German Penal Code uses the term *Notwehr*, or necessary defense.⁶⁹ In general, the concept of legitimate defense rolls together self-defense and defense of others under a broader notion of legitimate defense.

It is striking that the French and Spanish versions of the UN Charter use this broader locution to express the defensive force concept in Article 51. Was this a deliberate choice on the part of the drafters to codify both self-defense and defense of others within the same provision of Article 51? Many lawyers will be tempted to argue that the drafting process and negotiations were inevitably conducted in English, with translations that were developed at the final stage of the process. This argument would suggest that the English language version, through technically co-equal in weight with the other official language versions, should receive priority as a hermeneutical manner because of its status as a lingua franca. Although this is a plausible argument, it assumes that the different negotiators were fully aware that each State party involved in the drafting process was working with a unified and coherent set of legal concepts—the English language ones—and that they came to an agreement using the underlying common law concepts. Rather, it is much more likely that Article 51 was incompletely theorized, i.e., that it was designed to preserve the inherent right of self-defense in the absence of Security Council authorization, with

68. See, e.g., Model Penal Code § 3.04 (self), § 3.05 (others), § 3.06 (property), § 3.07 (law enforcement) (1962).

69. See STRAFGESETZBUCH (StGB) [PENAL CODE], May 15, 1871 REICHSGESETZBLATT [RGL.] 583, § 32 (“Notwehr: (1) Wer eine Tat begeht, die durch Notwehr geboten ist, handelt nicht rechtswidrig. (2) Notwehr ist die Verteidigung, die erforderlich ist, um einen gegenwärtigen rechtswidrigen Angriff von sich oder einem anderen abzuwenden.”). In English, the provision provides that “(1) A person who commits an act of necessary defense does not act unlawfully. (2) Necessary defense means any defensive action that is necessary to avert an imminent unlawful attack on oneself or another.” One could also translate *Notwehr* as “legitimate defense.” The advantage of the phrase “necessary defense” is that it explains and evokes the historical and conceptual relationship between justifications appealing to defensive force and defenses based on the principle of necessity.

little to no common agreement about when and how that right would be applied.⁷⁰ That was a retained ambiguity necessary for the agreement to be completed. And this ambiguity was magnified by the fact that different State parties came from different legal cultures in which the concept of defensive force is carved up in fundamentally different ways. In some jurisdictions, defense of others is *part* of legitimate defense, rather than separate from it. Nothing in the language of Article 51 excludes this interpretation.⁷¹

This is the major doctrinal payoff of recognizing the broader natural law genesis of Article 51: it provides an argument in favor of outside intervention in much the same way as responsibility to protect does. However, the legitimate defense doctrine does not provide an omnibus argument in favor of intervention in any situation when the results would be otherwise disastrous. The argument allows for intervention in only a few select situations based on the outer contours of the concept itself.

IV. LEGITIMATE DEFENSE AND HUMANITARIAN INTERVENTION

In the present Part, I first outline the criteria for exercising legitimate defense and show how the doctrine can provide a legal foundation for humanitarian intervention in select cases. Also, I argue that humanitarian intervention as justified by the doctrine of legitimate defense is preferable to the doctrine of responsibility to protect, the other leading contender for providing a legal foundation for humanitarian intervention.

The doctrine of legitimate defense provides a foundation for humanitarian intervention because it carves out from the Article 2 prohibition on the use of force not only self-defense, but also defense of others, which also falls under the rubric of legitimate defense. Drawing on principles of self-defense articulated in criminal law, the criteria for defense of others maps on exactly to the criteria for self-defense. As the natural law publicists clearly articulated, natural law protected the right of each individual human being to exercise force on his or her behalf, and this same principle applied in natural law to the exercise of force between

70. For a discussion of the negotiations, see RUTH B. RUSSELL, *A HISTORY OF THE UNITED NATIONS CHARTER* 698–99 (1958).

71. Cf. Josef Kunz, *Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations*, 41 *AMERICAN JOURNAL OF INTERNATIONAL LAW* 872, 875 (1947) (discussing continental notions of defensive force from domestic criminal law during analysis of defensive force under public international law).

collective groups. If an individual victim of an aggressor is entitled to use force in the exercise of his or her self-defense, other individuals are entitled to use force on their behalf as well. Indeed, it would be incoherent under criminal law to assert that an individual victim of aggression is entitled to use defensive force, but then deny that third parties may use force while coming to their defense.⁷² This is the whole point of referring to defensive force as a *justification* as opposed to an excuse.⁷³ Since justifications are general in nature and negate the wrongfulness of the act, it stands to reason that the justified actor engaging in defensive force has performed no wrongful action in defending himself. If the action itself is not wrongful, then third parties are entitled—by logical extension—to come to the aid of the original victim.⁷⁴ In this way, justifications always flow down to third parties, who by definition receive the benefits of the original actor's justification. Excuses, by contrast, do not flow down to third parties.⁷⁵ Since the basic structure of the natural right of legitimate defense stems from criminal law (it was developed by *analogy* in international law based on its original application in criminal law),⁷⁶ the same analysis applies to legitimate defense as exercised by nations. Consequently, a group's right to use defensive force on its behalf corresponds exactly with the right of third parties to exercise force on their behalf as well.

At this point, the doctrinal consequences of the argument are non-controversial. No one seriously doubts that States can come to the aid of third-party States that are attacked.⁷⁷ The more controversial question is whether the concept of defense of others that is implicitly contained within legitimate defense can ground a doctrine of humanitarian intervention.⁷⁸ I argue here that it can because the right belongs to national groups

72. See Marcia Baron, *Gender Issues in Criminal Law*, in THE OXFORD HANDBOOK OF PHILOSOPHY OF CRIMINAL LAW 335, 355 (John Deigh & David Dolinko eds., 2011).

73. See GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* (Oxford reprint 2010) (1978).

74. But see Kent Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 COLUMBIA LAW REVIEW 1897 (1984).

75. GEORGE P. FLETCHER, *BASIC CONCEPTS OF CRIMINAL LAW* 143 (1998).

76. For an older discussion of international law that made frequent reference to criminal law categories, see BOWETT, *supra* note 18, at 65.

77. See David K. Linnan, *Self-Defense, Necessity, and U.N. Collective Security: United States and Other Views*, 1 DUKE JOURNAL OF COMPARATIVE & INTERNATIONAL LAW 57 (1991).

78. For a general discussion of the legality of humanitarian intervention, see SEAN D. MURPHY, *HUMANITARIAN INTERVENTION: THE UNITED NATIONS IN AN EVOLVING WORLD ORDER* (1996).

regardless of whether or not the national group constitutes a State. In other words, if a national group located within a sovereign State is attacked, and that attack threatens their natural law right to exist, the national group has a right, sounding in natural law, to resist that unjustified attack. By extension, other nations have the right to come to the assistance of that national group through the exercise of the defense of others that is implicit in the doctrine of legitimate defense. And it is precisely this broader natural law right that is carved out of the prohibition against the use of force by Article 51. Other nations can intervene, even over the objection of the host State, because natural law protects the right of national groups to exercise self-preservation. This generates a right of unilateral intervention that falls under the rubric of the Article 51 carve-out from the prohibition against the use of force.

Some will object at this point that there is insufficient evidence that this right of legitimate defense should be attributed to nations or peoples. Lawyers working within a Westphalian framework of international law will insist that the right of self-defense is afforded to existing States only and that non-States, even groups that are best described as nations or peoples, have no rights of defense protected by the UN Charter.⁷⁹ This view is doctrinaire and mainstream, but it is wrong. There are several reasons why. First, if self-defense only applies to States, then it would be an outlier, since the other international rights which are most closely connected to it—the right to self-determination and the right to be free from genocide—apply to national groups, not just States. So in that respect, reserving the concept of self-defense to States would be an anachronism. Second, States are creatures of positive law, of the legal doctrines that structure the relationship of State recognition. Nations are not exactly natural kinds in nature,⁸⁰ but they are entities that exist regardless of whether positive law recognizes their political and social organizations as legal persons under the

79. For an example of strict interpretation of the right to self-defense, see the discussion in Thomas M. Franck, *Terrorism and the Right of Self-Defense*, 95 AMERICAN JOURNAL OF INTERNATIONAL LAW 839 (2001) (discussing limits on the right of self-defense and the conclusion of European public international lawyers that the U.S. use of force against the Taliban after 9/11 was illegal).

80. See ERNEST GELLNER, NATIONS AND NATIONALISM 47 (2008) (“Nations are not inscribed into the nature of things, they do not constitute a political version of the doctrine of natural kinds. Nor were national states the manifest ultimate destiny of ethnic or cultural groups. What do exist are cultures, often subtly grouped, shading into each other, overlapping, intertwined; and there exist, usually but not always, political units of all shapes and sizes.”).

international legal system. The right to exist, which finds expression in the rights of self-preservation, freedom from existential genocide and self-determination, is a right that is attributed to nations regardless of whether they constitute a State in the formal sense of that term. To claim otherwise is to deny the natural law right its rightful significance. Natural law predates the formation of our Westphalian system of States, and therefore some rights existing under natural law must attach to entities that endure even in the absence of the formal superstructure of State existence.

If we recognize that there exists a natural law doctrine of legitimate defense, then some traditional elements of self-defense should fall by the wayside. For example, the ICJ's *Nicaragua* decision argued that outside intervention on behalf of a victim required a formal request of assistance from the beleaguered victim of unlawful aggression.⁸¹ However, this requirement was constructed from whole cloth; nothing regarding it appears in the UN Charter. While it is clear that customary law prohibits pretextual uses of force—using military assistance as a cover for colonizing a victim of third-party aggression—there is no reason to think that a formal request for assistance is required to engage in defense of others.⁸² Indeed, it potentially creates perverse incentives and rewards bad behavior: if an outside force completely destroys a State and its government before a request for assistance can be tendered, then outside intervention is disallowed simply because the victim does not retain the formal political structure to issue it.

Indeed, the doctrine of legitimate defense entails that a formal request for assistance is unnecessary because in some situations, the beleaguered party might be a national group that has no formal political structure for making requests of assistance. If we reject the idea that the only formal entities capable of legitimate defense are States, then we must also reject the equally State-centric view that some kind of formal political request is

81. *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶ 199 (June 27) (“At all events, the Court finds that in customary international law, whether of a general kind or that particular to the inter-American system, there is no rule permitting the exercise of collective self-defence in the absence of a request by the State which regards itself as the victim of an armed attack. The Court concludes that the requirement of a request by the State which is the victim of the alleged attack is additional to the requirement that such a State should have declared itself to have been attacked.”).

82. Indeed, concerns about pretextual claims are implicit in *any* scheme regarding the use of force, though they are particularly acute in the context of humanitarian intervention. For a discussion, see JOSHUA JAMES KASSNER, *RWANDA AND THE MORAL OBLIGATION OF HUMANITARIAN INTERVENTION* 159 (2013).

required before outside parties can render their assistance. Indeed, it would seem absurd to suggest that the Tutsis in Rwanda could not be defended simply because they had no political structure to issue an official and de jure request for assistance.

The doctrine of legitimate defense provides a more legally satisfying foundation for humanitarian intervention than the responsibility to protect, a legal doctrine that asserts that outside intervention is permissible to protect civilian populations from widespread human rights disasters.⁸³ The problem with the RTP doctrine is that it is mostly an exercise in wishful thinking. Proponents of the doctrine argue that it was crafted by an international commission, at the behest of the United Nations, after the Kosovo intervention was widely viewed as *both* illegal under international law and morally legitimate—a tension that required some sort of revision. Either international law needed to be tweaked or the international community needed to concede that international law was, stubbornly, immoral.

The result was the RTP commission and its widely heralded report.⁸⁴ Unfortunately, it is an exaggeration to give the commission the imprimatur of the United Nations. The commission was a creature of the *Canadian government*, not the United Nations, although its members were individuals from around the world, and it had taken up the challenge noted by Kofi Anan, then Secretary-General of the United Nations, to resolve the humanitarian intervention paradox. What of the much-heralded “adoption” of the RTP report by the General Assembly? That resolution simply urged the Security Council to take action to protect civilian populations.⁸⁵ The

83. For a general canvassing of relevant doctrines regarding intervention, see Mary Ellen O’Connell, *Historical Development and Legal Basis*, in *THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW* 1, 9–10 (Dieter Fleck ed., 3d ed. 2013).

84. INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, *THE RESPONSIBILITY TO PROTECT* (2001).

85. 2005 World Summit Outcome, G.A. Res. 60/1, U.N. Doc. A/RES/60/1 (Sept. 16, 2005) ¶ 139 (“The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to

resolution said absolutely *nothing* about the most aggressive aspect of the RTP doctrine: the alleged unilateral right of all nations to intervene militarily to stop a crisis in the *absence* of Security Council authorization. In fact, the resolution emphasized the need for action within the Security Council framework. Indeed, the doctrine itself is fundamentally vague; it includes the notion of unilateral intervention, but also the much thinner notion that the international community has a diffuse duty to lessen the impact of war that falls on innocent civilians. That fundamental ambiguity to RTP—does it mean something trite or tectonic—has allowed the doctrine to flourish because at each moment that someone endorses it no one really knows which version is being supported.⁸⁶

The bigger problem with the RTP doctrine, in its tectonic variation, is that it represents an *exception* to the UN Charter that falls outside the scope of its provisions on the use of force.⁸⁷ This is a problem not just for RTP, but for all arguments of humanitarian intervention that couch themselves as exceptions to the Articles 2 and 51 framework. Even Cassese, writing in his famous *European Journal of International Law* article regarding Kosovo in 1999, declared that humanitarian intervention might emerge, through custom, as an exception to the general framework established by the UN Charter that force is only permitted via a Security Council authorization or Article 51.⁸⁸ But what does it mean to call this general framework an

protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law.”).

86. See, e.g., Ban Ki-Moon, U.N. Secretary-General, Remarks at Berlin Event “Responsible Sovereignty: International Cooperation for a Changed World” (July 15, 2008), which are vague about whether RTP allows for unilateral intervention (“Properly understood, RtoP is an ally of sovereignty, not an adversary. Strong States protect their people, while weak ones are either unwilling or unable to do so. Protection was one of the core purposes of the formation of States and the Westphalian system. By helping States meet one of their core responsibilities, RtoP seeks to strengthen sovereignty, not weaken it.”).

87. See Antonio Cassese, *Ex Iniuria Ius Oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?*, 10 EUROPEAN JOURNAL OF INTERNATIONAL LAW 23 (1999).

88. *Id.* at 29 (“However, if one takes into account the premise of that forcible action and the particular conditions surrounding it, the following contention may be warranted: this particular instance of breach of international law may gradually lead to the crystallization of a general rule of international law authorizing armed countermeasure for the exclusive purpose or putting an end to large-scale atrocities amounting to crimes against humanity and constituting a threat to the peace. Such a rule, should it eventually evolve in the world community, would constitute an *exception* to the UN Charter system of

exception? It sounds awfully like *ignoring* the Charter, or at the very least trying to implicitly amend it without following the actual amendment procedure laid down for altering the foundational document.⁸⁹ And therein lays the great difficulty with RTP and all other arguments for humanitarian intervention that involve crafting exceptions to Article 51: they weaken the Charter by suggesting that its provisions can be ignored when they are inconvenient. They undermine international law and its use-of-force framework because they craft ad hoc exceptions that run the risk that some members of the international community will start doing the same thing with the rest of the document as well. Weakening the basic structure of the UN Charter is a dangerous business.

In contrast, the doctrine of legitimate defense works *within* the Charter by recognizing the absolute centrality of Article 51 for governance of use-of-force questions. It accomplishes this task by offering a subtle reading of Article 51, carefully attuned to the natural law origins of defensive force and the positive law incorporation and preservation of that right into the text of Article 51. By working within the four corners of Article 51, the doctrine of legitimate defense strengthens—rather than weakens—the legitimacy of both Article 51 and the Charter as a whole.⁹⁰ Granted, the doctrine of legitimate defense represents a vanguard interpretation of Article 51 out of step with current treatments of the issue in doctrinal treatises,⁹¹ but in many ways it offers a hermeneutical approach more carefully attuned to the text of Article 51 than other arguments regarding the use of force. These other, allegedly more “standard,” interpretations offer no explanation for why natural law should be excluded from the scope of the analysis when it is so explicitly referenced in the text of Article 51.

The doctrine of legitimate defense is also preferable to using the doctrine of necessity on which to ground humanitarian intervention.

collective enforcement based on the authorization of the Security Council. In other words, it would amount to an exception similar to that laid down in Article 51 of the Charter (self-defence).”).

89. *See* U.N. Charter art. 108 (“Amendments to the present Charter shall come into force for all Members of the United Nations when they have been adopted by a vote of two thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by two thirds of the Members of the United Nations, including all the permanent members of the Security Council.”).

90. This point is also made in FLETCHER & OHLIN, *supra* note 27, at 134.

91. *See, e.g.*, JAMES CRAWFORD, BROWNIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 750–70 (8th ed. 2012).

Necessity is clearly a ground for excusing a State from responsibility for an internationally wrongful act.⁹² Belgium pled necessity before the ICJ when Yugoslavia (Serbia) sued Belgium for its participation in NATO-led bombings of Serbian targets.⁹³ Belgian counsel argued that the doctrine of necessity permitted military intervention when necessary to stop widespread human rights abuses and atrocities against innocent civilians.⁹⁴ This implied a balancing approach: if the harm of intervention was outweighed by the greater harm avoided, then the intervention could be justified by necessity.⁹⁵ Although the ICJ resolved the case on jurisdictional grounds and never reached the merits, it is doubtful that the Court would have accepted the argument. First, the necessity doctrine, on most accounts, requires that the State in question act in fulfillment of essential State interests, whereas in this case Belgium was acting to secure someone else's interests. So necessity protects a State acting for selfish reasons, but not for altruistic or humanitarian reasons; therefore, it cannot serve as a ground for humanitarian intervention. But even if this doctrinal requirement were avoided, the greater problem with the doctrine of necessity is again its weakening of the Article 51 framework. By working from the outside, it suggests that Article 51 is subject to artificial and ad hoc exceptions, rather than doing the more difficult work of offering an interpretation that is *internally* consistent with the practice of humanitarian intervention.

V. APPLYING THE DOCTRINE OF LEGITIMATE DEFENSE

The next task is to apply the doctrine sketched out in the previous parts by looking to concrete situations so as to identify the real impact of the doctrine of legitimate defense. The most prominent case of humanitarian intervention—the situation that arguably gave birth to the doctrine of the responsibility to protect—was the NATO intervention against Serbia in response to the civil war in the former Yugoslavia and, following that,

92. See Robert D. Sloane, *On the Use and Abuse of Necessity in the Law of State Responsibility*, 106 AMERICAN JOURNAL OF INTERNATIONAL LAW 447 (2012).

93. See Oral Pleadings of Belgium, Legality of Use of Force (Yugo. v. Belg.), 1999 I.C.J. Pleadings 15 (May 10, 1999), available at <http://www.icj-cij.org/docket/files/105/4515.pdf> (uncorrected translation).

94. *Id.*

95. *Id.* (“A state of necessity is the cause which justifies the violation of a binding rule in order to safeguard, in face of grave and imminent peril, values which are higher than those protected by the rule which has been breached.”).

reports of ethnic cleansing in Kosovo. NATO forces bombed Serbia multiple times, the first in 1995 after atrocities were committed in Bosnia, and the second in 1999 after allegations of atrocities committed by pro-Serbian forces in Kosovo. The bombing led to the withdrawal of Serbian forces from Kosovo, the introduction of United Nations peacekeepers into the region, the creation of a semi-autonomous government for Kosovo and eventually a unilateral claim of Kosovo independence. As discussed above, the military intervention, though widely celebrated (outside of Serbia), was not authorized by the Security Council and sparked collective handwringing over the legitimacy of the UN framework regarding the use of force. If the Charter prohibited NATO's bombing campaign, and the action was morally justified, what does this say about international law? That international law is immoral? That is probably an exaggeration, but at the very least the situation opened up the possibility of a substantial gap between international law and morality.⁹⁶

The anxiety is understandable, but ultimately resolvable. As I now explain, the international law framework for the use of force, once properly understood, allowed for the NATO intervention against Kosovo. It was legal. And more importantly, it was legal according to Article 51. One need not appeal to some extra-legal claim regarding morality, or new *exceptions* to the Charter's use-of-force regime. The seeds for justifying the Kosovo operation lay within the words of Article 51 itself.

In the midst of a civil war, ethnic Albanian civilians in Kosovo were attacked by military forces operating either under the *de jure* or *de facto*

96. See David Wippman, *Kosovo and the Limits of International Law*, 25 FORDHAM INTERNATIONAL LAW JOURNAL 129, 130–31 (2001) (“These distinctive characteristics of the NATO intervention created an irresolvable tension between the formal law of the U.N. Charter and the actual practice of States whose conduct is central to international lawmaking. The breach of the Charter was clear and apparent. NATO did not seek or receive Security Council authorization, and it was not acting in self-defense. For many international lawyers, the analysis ends there. But simply labeling the intervention illegal is unsatisfactory. The authority of international law rests on a reasonable congruence between formally articulated norms and State behavior; when the two diverge too sharply, the former must adapt or lose their relevance. The scope of the Kosovo operation, the identity of the participants and the lack of a coherent legal rationale all combine to render it difficult to dismiss the intervention as an anomaly with no lasting impact on international law. But at the same time, the continuing disagreement within NATO and among States generally over the legitimacy and desirability of unauthorized humanitarian intervention make it difficult to discern any clear change or evolution in the law. The result is a persistent and disquieting uncertainty.”).

control of Serbia.⁹⁷ The attacks targeted and killed not just Kosovo Liberation Army rebel forces in Kosovo, but also civilians. The ethnic Albanians of Kosovo are arguably a nation or people (Kosovars), or at the very least part of the Albanian nation.⁹⁸ Although this fact is a sociological and ethnographic fact—as opposed to a legal fact—it is entirely plausible that the Kosovars constitute an ethnic group that is protected by the law. Indeed, they are protected by the law of genocide in the sense that an attack against the ethnic Albanians in Kosovo designed to destroy their group in whole or in part (performed with genocidal intent) would constitute the crime of genocide.⁹⁹ The group has the right to be free from existential destruction and that right is codified in the Genocide Convention.

The most controversial application of my claim is that the ethnic Albanians had a right of legitimate defense once they were unlawfully attacked by Serbian forces. There are several ways of expressing this legal claim. First, one might put the point this way: the Kosovars constitute a legally protected people who have not only the right of self-determination, but also the more primary natural right to exist. When that right is threatened because they are militarily attacked, they have the right—under natural law—to exercise lawful self-defense on their own behalf. The fact that the Kosovars did not enjoy international statehood is no reason for denying them the right of self-defense. Statehood is a function of the international legal system, and the natural right to self-defense would apply even if there were no international legal system in operation. The natural right of self-defense is logically independent of statehood. If the Kosovars

97. See Prosecutor v. Šainović et al., Case No. IT-05-87-A, Appeals Judgment (Int'l Crim. Trib. for the former Yugoslavia Jan. 23, 2014) (affirming convictions but reducing some sentences of Serbian officials responsible for Kosovo atrocities). For a discussion of this decision (including its discussion of the “specific direction” standard for aiding and abetting liability), see Marko Milanovic, *The Self-Fragmentation of the ICTY Appeals Chamber*, EJIL: TALK! (Jan. 23, 2014), <http://www.ejiltalk.org/the-self-fragmentation-of-the-icty-appeals-chamber/>.

98. See Christopher J. Borgen, *Kosovo's Declaration of Independence: Self-Determination, Secession and Recognition*, ASIL INSIGHTS (Feb. 29, 2008), <http://www.asil.org/insights/volume/12/issue/2/kosovos-declaration-independence-self-determination-secession-and> (“it remains an open question whether widespread support of Kosovo’s independence would signal a shift in the definition of ‘people’ so that the term no longer represents a complete ethnic nation but can be used to refer to a homogenous ethnic enclave within another nation”).

99. For a description of the conflict, see SAMANTHA POWER, *A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE* 443 (2002).

are attacked, they have the right to defend themselves to vindicate their right to exist.

This is where the language of Article 51 comes into play. Because the Kosovars have the right to defend themselves against an unjust and unlawful attack, third-parties have the right to come to their aid through the exercise of defense of others. The conditions for lawful defense of others track the conditions for lawful self-defense. So if the Kosovars have a right of self-defense against an unjust attack, then NATO was necessarily permitted to intervene on their behalf. It is nonsensical to claim that someone has a right of self-defense but no one has a corresponding right to defend them. The two always go together.

Article 51 vindicates this analysis. Its bare terms carve-out the natural right of *légitime défense*, a broader category of defensive force that includes both self-defense and defense of others in one omnibus justification. So NATO and its member States were permitted to engage in defensive force on behalf of Kosovo just as long as Kosovo had a natural right to defend itself. This is the essence of legitimate defense. Article 51 also imposes other restrictions though they were clearly satisfied in the Kosovo situation. The right of response is only triggered once an “attack” occurs. In the Kosovo case an attack certainly *did* occur, and it was a vicious and sustained one against the Kosovar people. Under natural law, the Kosovars have the right to exist and third parties have a natural law right to exercise legitimate defense on their behalf. NATO exercised that right.¹⁰⁰ The result is that the existence of the Kosovar people was preserved.

Putting the same point in terms that would have been comprehensible to the natural law theorists, every nation has a right of self-preservation. The United States, Belgium and other members of NATO each have the right to engage in self-preservation, and that right generates a corresponding duty as well. Both the right and duty attach not just to the bare fact of self-preservation in the existential sense, but also the right and duty to *perfect* their preservation. The natural law theorists were explicit that this generated a right of intervention, especially when other States were

100. See Steven Erlanger, *NATO Was Closer to Ground War in Kosovo than is Widely Realized*, NEW YORK TIMES, Nov. 6, 1999, § 1, at 6, available at <http://www.nytimes.com/1999/11/07/world/nato-was-closer-to-ground-war-in-kosovo-than-is-widely-realized.html> (noting that Tony Blair was preparing to officially activate thirty thousand British reservists so as to send fifty thousand troops into battle in Kosovo). President Clinton was also making preparations for a ground invasion with an additional one hundred twenty thousand American troops. *Id.*

being obstinate and failing to perfect their own right of preservation.¹⁰¹ This point naturally applies to the coordinated international intervention against Serbia. As Lauterpacht and Oppenheim put the point, interventions to perfect the right of preservation were justified to force a State to comply with its international obligations.¹⁰² Since Serbian forces were violating international obligations by systematically killing civilians and violating other provisions of international humanitarian law and international human rights law, the international community was justified under international law in intervening in order to rectify this malfeasance.

One might object that some of these Serbian actions were not, strictly speaking, violations of international law at the time that the natural law theorists were writing. Neither international humanitarian law nor international human rights law existed in their current manifestations, though the laws and customs of war are of ancient vintage and certainly existed (and were extensively discussed by the natural law theorists). The idea that is so important to human rights law—that a sovereign’s treatment of its own citizens is a matter of international concern—is a recent development in the history of human rights and international law.¹⁰³ The modern-day “thinness” of sovereignty is a post-World War II development.

There are two answers to this objection. First, the history is not entirely accurate. Yes, the birth of human rights law after World War II ended a period of strong sovereignty embodied in the Westphalian order.¹⁰⁴ However, the story is not so simple. It is more accurate to say that sovereignty has waxed and waned over the years, moving through periods and phases where individual States received greater or lesser degrees of insulation from outside “interference” and intervention. There was a time, for example, when outside intervention from third States was more common than it is now because the right to engage in warfare was not completely restricted. Second, the exact nature of the international law violations committed by the host States is irrelevant. The key point is that the natural law theorists believed in a right of intervention, based on self-

101. See *supra* notes 38–45 and accompanying text (discussing Vattel).

102. See *supra* notes 50–54 and accompanying text.

103. See LOUIS HENKIN, *THE AGE OF RIGHTS* (1990).

104. For a discussion, see Benjamin N. Schiff, *Universalism Meets Sovereignty at the International Criminal Court*, in *NEGOTIATING SOVEREIGNTY AND HUMAN RIGHTS: ACTORS AND ISSUES IN CONTEMPORARY HUMAN RIGHTS POLITICS* 59 (Michaelene Cox & Noha Shawki eds., 2009).

preservation, to deal with recalcitrant States that refused to obey their international obligations. The *content* of those international obligations is mostly irrelevant for the argument. What matters is that natural law recognized that right of intervention when necessary to *perfect* the right of self-preservation, and the exact content of the international legal norms violated by the offending State is not material to the right of intervention triggered by their violation. The fact that Serbia violated human rights norms that only crystallized after World War II should not matter to the analysis.

Having considered a situation where the doctrine of legitimate defense justifies intervention (Kosovo), we should now consider a baseline—a realtime scenario where intervention is *not* justified by the doctrine. The recent military excursions by Russia in Crimea and eastern Ukraine provide an excellent example.

Russian troops covertly entered Crimea and, without wearing identifying insignia, took control of key installations on the Ukrainian-controlled territory.¹⁰⁵ Presumably the Russians engaged in the pretext of anonymity because they wanted to preserve the option of classifying the deployed battalions as homegrown, Russian-speaking militias from Crimea (rather than an outside military force).¹⁰⁶ This strategy never came to fruition because the world saw the troops for what they were—forces dispatched by the Kremlin. Although the government of Ukraine—and foreign powers—complained about the Russian annexation of Crimea, no one was willing to go to war with Russia over the peninsula. Ukraine eventually ceded de facto control over the territory to Russia.¹⁰⁷

105. See Andrew Higgins, *Amid More Signs of Russian Force in Crimea, Delight Mixes with Dismay*, NEW YORK TIMES, Mar. 2, 2014, at A15, available at http://www.nytimes.com/2014/03/02/world/europe/tensions-rise-in-crimean-capital-as-armed-men-continue-to-take-up-posts.html?_r=0.

106. *Id.* (“None of the heavily armed soldiers had insignia on their green combat uniforms, and for days, Russia insisted that it was just a spectator to the dramatic events unfolding in the Ukrainian region of Crimea and was as puzzled as everyone else by the identities of masked gunmen who had seized Crimea’s two main airports and its Parliament and main government office buildings.”).

107. See David M. Herszenhorn & Andrew E. Kramer, *Ukraine Plans to Withdraw Troops From Russia-Occupied Crimea*, NEW YORK TIMES, Mar. 19, 2014, at A14, available at <http://www.nytimes.com/2014/03/20/world/europe/crimea.html> (“While the provisional government in Kiev has insisted that Russia’s annexation of Crimea is illegal and has appealed to international supporters for help, the evacuation announcement by the head of the national security council, Andriy Parubiy, effectively amounted to a surrender of Crimea, at least from a military standpoint.”).

Was the Russian intervention in Crimea an exercise of legitimate defense? Arguably not, but not because of the usual reason, i.e., the intervention came from an outside source. Rather, the doctrine of legitimate defense fails to justify intervention in this case because the Russian-speaking Crimean people were never attacked. They were not subject to widespread or systematic human rights abuses, they were not subject to crimes against humanity or other forms of ethnic cleansing, and they were not victimized by an attempted genocide. Their right to existence was never threatened and, consequently, their right of self-preservation, and the need to use defensive force, was never triggered. Because the Crimeans themselves had no right to use defensive force on their behalf, there was no corresponding legitimate defense (defense of others) that could be exercised by the Russian military forces from Moscow. Whether the Crimeans had a right of self-determination that was not fulfilled by their existing arrangement within Ukraine is a separate question and not one that is properly addressed in this essay. It should be noted, however, that although the Russian-speaking Crimeans arguably have a right of self-determination, their internal political arrangement with Ukraine permitted them a strong amount of regional autonomy, such that it is probable that their right of *internal* self-determination was protected before the Russian annexation of their territory. A similar analysis applies to the Russian-speaking population of eastern Ukraine. Although this region of Ukraine does not enjoy the regional autonomy that the local government of Crimea enjoyed, it is nonetheless important to note that the ethnic Russians in eastern Ukraine were neither attacked nor suffered an existential threat that would have triggered a right of response—and a corresponding right of intervention by third parties—under the doctrine of legitimate defense.

VI. CONCLUSION

The doctrine of legitimate defense will inevitably be criticized from both sides of the spectrum. Traditional advocates for robust restrictions on the use of force will complain that it licenses too much intervention, potentially destabilizing the world community,¹⁰⁸ and that the doctrine could be cited

¹⁰⁸ For a discussion of the tension between “balancers” and “bright-liners,” see Matthew C. Waxman, *Regulating Resort to Force: Form and Substance of the UN Charter Regime*, 24 EUROPEAN JOURNAL OF INTERNATIONAL LAW 151, 157 (2013) (“While giving broad discretion to the UN Security Council—a process that although internally quite unconstrained can yield clear directives—Bright-Liners generally argue that any use of

as a pretext for military interventions that are motivated by ulterior concerns. Also, legal positivists will complain that the doctrine strays from the established reading of the text of Article 51 and is unmoored from traditional sources of public international law because natural law is not an acceptable source of law. On the other end of the spectrum, advocates for humanitarian intervention will complain that the doctrine of legitimate defense is too timid because it does not justify interventions in situations (including humanitarian disasters) that do not involve military attacks or existential threats that trigger the right of self-preservation. The answer to both sides of the spectrum is exactly the same. The doctrine of legitimate defense is not an example of wishful thinking; its content cannot be dreamed up based on desire alone. Its content is provided by natural law and the bare text of Article 51, which incorporates natural law by reference and carves out its content from the Article 2 prohibition on the use of force. Most importantly, the fact that the doctrine does not justify *all* interventions is a virtue of the theory—not a vice. It would be better to defend a legal doctrine that is justified by the current state of the law, and a close reading of its foundational treaty and its relevant provisions, rather than make up a panicky and expansive doctrine designed only to fill the gaps of the current law identified by our moral intuition.

force beyond that authorized by the UN Security Council should be regulated by sharp lines, or rules that admit very little discretionary balancing by individual states (whether those contemplating or using force or those judging it).”).